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CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

October Term, 1941.

No. 795.

PLOW CITY STEAMSHIP COMPANY, CLAIMANT OF THE STEAMSHIP "PLOW CITY" (Respondent-Appellee in the Court Below),

Petitioner,

v.

TEXAS GULF SULPHUR COMPANY, INCORPORATED (Libellant-Appellant in the Court Below),

Respondent.

PETITIONER'S REPLY BRIEF.

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TABLE OF CASES IN REPLY BRIEF.

	Page
Commercial Molasses Corp. v. New York T. B. Corp. (1941) U. S. , 62 S. Ct. 156, 86 L. ed. Adv. Ops. 125	1, 3
The Edwin I. Morrison, (1894) 153 U. S. 189, 38 L. ed. 688, 14 S. Ct. 823	1, 3
Matton Oil Transfer Corp. v. Diesel Tug "Dynamic" (Unreported, except in 5 Fed. Rules Serv. 52a-11, Case 2)	3, 5

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Petitioner,

v.

TEXAS GULF SULPHUR COMPANY, INCORPORATED (LIBELLANT-APPELLANT IN THE COURT BELOW),

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PETITIONER'S REPLY BRIEF.

I.

Respondent argues that the decision of the Circuit Court of Appeals for the Third Circuit is not in conflict with the decision of this Court in *Commercial Molasses Corp. v. New York T. B. Corp.*, (1941) U. S. , 62 S. Ct. 156, 86 L. ed. Adv. Ops. 125, because, respondent contends, the "Plow City" assumed the obligation of a common carrier. This argument is based upon the fact that the so-called "bill of lading" (Libellant's Exhibit 1) contains the words "to be delivered in like good order and condition" and, according to respondent, the majority opinion in the Commercial Molasses case differentiated *The Edwin I. Morrison,* (1894) 153 U. S. 199, 38 L. ed. 688, 14 S. Ct. 823, on that same ground.

Respondent overlooks the fact that, as the majority opinion in the Commercial Molasses case is careful to point out, the undertaking of the master-owner of the "Edwin I. Morrison" to deliver in good order and condition was subject only to an exception of "dangers of the sea." In the present case, on the other hand, the "bill of lading" contained a great many exceptions, and could in no way be construed to be an assumption of an insurer's liability.

Respondent also makes no mention of the even more important fact that the "bill of lading" incorporated by reference all the terms and exceptions of a charter party dated March 26, 1937, between American Range Lines, Inc., operator of the "Plow City", and International Freighting Corporation, Inc., which had entered into a similar charter party with respondent. Neither of these charter parties contains any undertaking to deliver in good order and condition.

In the District Court respondent took the position that the "bill of lading" was a mere receipt. In the Circuit Court of Appeals respondent, while apparently not conceding that it was bound by any agreement to which it was not a signatory party, assumed for the purpose of the argument that the exemptions contained in the charter party of March 26, 1937, were incorporated in the "bill of lading" by reference. Now, it seems, respondent would have the "bill of lading" regarded as constituting its entire contract with the "Plow City" and petitioner.

It is clear from the opinions below that both the District Court and the Circuit Court of Appeals took the view that the "bill of lading" must be construed together with the charter party in order to ascertain the terms of the contract here in question. Moreover, it must be borne in mind that not only the "bill of lading" but the charter party

as well were respondent's own forms adapted to fit the particular circumstances of the entire transaction. Obviously the "bill of lading" was never a bill of lading at all in the sense that such a document normally constitutes the entire contract between the shipper and the ship and shipowner. It follows, therefore, that there never was in this case any assumption of the obligation of a common carrier by reason of any of the provisions of the so-called "bill of lading."

It is submitted that the distinction which this Court drew in its decision in *Commercial Molasses Corp. v. New York T. B. Corp., supra,* between that case and the case of *The Edwin I. Morrison, supra,* does not exist between the Commercial Molasses case and the present case, and that certiorari should be granted to resolve the conflict between the decision of the Circuit Court of Appeals and this Court's said decision.

II.

On December 1, 1941, the Circuit Court of Appeals for the second Circuit handed down its decision in *Matton Oil Transfer Corp. v. Diesel Tug "Dynamic".* The case is as yet unreported except in 5 Fed. Rules Serv. 52a.11, Case 2, and it came to the attention of counsel for petitioner too late to be referred to in the brief in support of the petition for a writ of certiorari, which was filed on December 11, 1941.

In that case no findings of fact or conclusions of law were made by the District Court, and there was only a brief statement by the District Judge at the conclusion of the trial setting forth his determination as to the liabilities. The decree subsequently entered referred to this brief statement as an "oral opinion." An appeal followed.

In a per curiam opinion the Circuit Court of Appeals for the Second Circuit stated:

> "As we have regularly held, the substance of the admiralty rule requires, as in ordinary civil actions, that we should give due weight to the findings of fact made by the trial judge, who has had the opportunity to see the witnesses as they testified and thus determine the truth of disputed testimony in ways not open merely on inspection of a printed appellate record. Hence we have often decided that admiralty findings, like civil findings generally, should not be set aside unless clearly erroneous. Commercial Molasses Corp. v. New York Tank Barge Corp., 114 F. (2d) 248, 250, *aff'd* S. Ct. , Nov. 17, 1941; *The Aakre*, 122 F. (2d) 469, 474, and cases cited. Consequently we do not feel that we can properly dispose of this case without the help which observance of the rule would afford us. Moreover, the insistence of the Supreme Court upon appropriate findings should not be disregarded. Mayo v. Lakeland Highlands Canning Co., 309 U. S. 310, 316, and cases cited; Interstate Circuit, Inc. v. United States, 304 U. S. 55; *cf.* Smith v. Lykes Brothers-Ripley S.S. Co., 105 F. (2d) 604, (C. C. A. 5th), *cert. den.* 308 U. S. 604; *The Plow City*, 122 F. (2d) 816, 819 (C. C. A. 3d)."

The Circuit Court of Appeals reversed the decree of the District Court and remanded the cause "with directions to the district court to state its findings of fact and conclusions of law as required by Admiralty Rule 46½." In the present case the Circuit Court of Appeals reversed the decree of the District Court and remanded the cause "with directions to ascertain the damages sustained by the libellant and to enter final judgment for the libellant in such sum, with costs to the libellant."

It is submitted that the procedure directed by the Circuit Court of Appeals for the Second Circuit in the case of *Matton Oil Transfer Corp. v. Diesel Tug "Dynamic"*, *supra*, is the procedure which should have been directed in the present case, assuming that the District Court for the Eastern District of Pennsylvania did not sufficiently comply with Admiralty Rule 46½. It is further submitted, therefore, that certiorari should be granted because the Circuit Court of Appeals for the Third Circuit has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

III.

It is submitted that certiorari should be granted to reverse the decision of the United States Circuit Court of Appeals for the Third Circuit.

Respectfully submitted,

GEORGE E. BEECHWOOD,
JAMES S. BENN, JR.,
CONLEN, LABRUM & BEECHWOOD,
Proctors for Petitioner.